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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 CHRISTOPHER BISTRYSKI,

12 Plaintiff,

13 v.

14 DOC HEALTH SERVICES OF  
15 STAFFORD CREEK CORRECTIONS  
16 CENTER, DOC HEALTH SERVICES OF  
17 MONROE CORRECTIONAL COMPLEX  
18 – SPECIAL OFFENDERS CENTER,  
19 SCOTT LIGHT, DR. MICHAEL FURST,  
20 CHARLES CASEY, SHERYL ALBERT,  
21 MEDICAL CARE REVIEW  
COMMITTEE, DR. G. STEVEN  
HAMMOND, Chief Medical Officer,  
STEVEN SINCLAIR, Secretary of  
Washington DOC, individually and in their  
official capacities,

Defendants.

CASE NO. 17-5369 RJB

ORDER ON REPORT AND  
RECOMMENDATION

22 THIS MATTER comes before the Court on the Report and Recommendations of U.S.  
23 Magistrate Judge Theresa L. Fricke. Dkt. 54. The Court has reviewed the Report and  
24 Recommendations, objections, the remaining file and is fully advised.

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In September 2017, several of the institutional Defendants moved to dismiss his claims against them (Dkt. 21) as did Defendant Dr. Michael Furst (Dkt. 23). A week later, Plaintiff moved to amend his complaint to attempt to resolve some of the deficiencies. Dkt. 25. That same day, Plaintiff also filed a motion for a temporary restraining order and for a preliminary injunction seeking an order from the court requiring that the Defendants provide him adequate medical care. Dkt. 24.

On December 29, 2017, some, but not all, the Defendants filed a Motion to Dismiss claims asserted against them in the Amended Complaint. Dkt. 38. On January 9, 2018, the undersigned declined to adopt the Reports and Recommendations because they referred to the original complaint and not the amended complaint. Dkt. 41. The case was re-referred. *Id.* On February 23, 2018, Defendant Furst filed a motion to dismiss. Dkt. 49. (The only Defendants

1 that have not moved to dismiss the case are Defendants Sheryl Albert and Dr. Steven Hammond.  
2 There is an order for Plaintiff to show cause why these Defendants should not be dismissed, but  
3 Plaintiff has until May 18, 2018 to respond.)

4 On April 11, 2018, the instant Report and Recommendation was filed. Dkt. 54. The  
5 Plaintiff filed objections (Dkt. 55) and the Defendants filed a response to the objections (Dkt.  
6 57). The Report and Recommendation is ripe for decision.

### 7 **DISCUSSION**

8 **Report and Recommendation's Recommendations and Plaintiff's Objections**  
9 **regarding the Motions to Dismiss.** The Report and Recommendation recommends, in part, that  
10 the motion to dismiss by DOC Health Services of Stafford Creek Corrections Center, DOC  
11 Health Services of Monroe Corrections Center Special Offender Center and the Medical Care  
12 Review Commission (Dkt. 38) be granted because neither a state nor a state agency is a person  
13 under § 1983; likewise, a state official acting in their official capacity is not a "person" for  
14 purposes of damages claims under § 1983. Dkt. 54. The Report and Recommendation also  
15 recommends that the motion to dismiss by individual Defendants Light and Sinclair (Dkt. 38) be  
16 granted because Plaintiff still fails to allege sufficient facts for relief against them in his  
17 Amended Complaint. Plaintiff does not object to these recommendations.

18 The Report and Recommendation recommends that Defendant Casey's motion to dismiss  
19 (Dkt. 38) be granted. Plaintiff objects to dismissal of the claims against Defendant Casey,  
20 arguing that the Report and Recommendation erred in its interpretation of Defendant Casey's  
21 capacity to know of Plaintiff's substantial risk of harm, that Plaintiff was harmed when he was  
22 returned to his cell, and the Report and Recommendation's finding that "further neurological  
23 examination results will not be relevant to the issue before the Court." Dkt. 55.

1           The Report and Recommendation (Dkt. 54) should be adopted regarding the motion to  
2 dismiss by DOC Health Services of Stafford Creek Corrections Center, DOC Health Services of  
3 Monroe Corrections Center Special Offender Center and the Medical Care Review Commission,  
4 Light, Sinclair and Casey (Dkt. 38); it (Dkt. 38) should be granted and the claims against them  
5 dismissed. Plaintiff's objections do not provide a basis to fail to adopt this portion of the Report  
6 and Recommendation. While Plaintiff objects to the Report and Recommendation's  
7 "interpretation" of Defendant Casey's required state of mind for liability, the Report and  
8 Recommendation provides the legal standard, and finds that the facts alleged by Plaintiff, even in  
9 the Amended Complaint, fail to state a claim for relief against Casey. Plaintiff's arguments, that  
10 he was actually harmed and that the Report and Recommendation erred in stating that a further  
11 neurological examination is not relevant, miss the mark. The standard is whether Casey was  
12 deliberately indifferent to a serious medical need. For the reasons provided in the Report and  
13 Recommendation, Plaintiff failed to adequately plead the elements of the claim in the Amended  
14 Complaint, and so Plaintiff's claims against Defendant Casey should be dismissed.

15           The Report and Recommendation recommends granting Defendant Furst's motion to  
16 dismiss (Dkt. 49) because Plaintiff's Amended Complaint failed to allege sufficient facts that  
17 Defendant Furst had the requisite state of mind. Dkt. 54. Plaintiff objects, arguing that he told  
18 Dr. Furst that he thought he was being poisoned, and that Dr. Furst's defense of not believing  
19 him is insufficient without "doing due diligence." Dkt. 55. Plaintiff's Amended Complaint  
20 undermines his assertion in his objections that no due diligence was done – it indicates that Dr.  
21 Furst spoke with Plaintiff, evaluated him, and determined that there was no medical evidence to  
22 support Plaintiff's claims that he was being poisoned. Dkt. 32. Plaintiff's desire for more  
23 extensive testing is not adequate to show that Dr. Furst was deliberately indifferent to Plaintiff's  
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1 medical needs. While Plaintiff argues in his objections that Dr. Furst did not consider any other  
2 diagnosis other than that he was delusional, Plaintiff makes no allegations that plausibly support  
3 this theory in the Amended Complaint (or in his objections). For the reasons provided in the  
4 Report and Recommendation, Plaintiff's claims against Defendant Furst should be dismissed.

5 **Report and Recommendation's Recommendations and Plaintiff's Objections**  
6 **regarding the Motions for Preliminary Injunctive Relief.** The Report and Recommendation  
7 regarding the motions for preliminary injunctive relief (Dkt. 54) should be adopted. As stated in  
8 the Report and Recommendation, in both Plaintiff's motions for injunctive relief, he moves for  
9 an order from the Court "to ensure that he receives proper medical care," that is to see "a  
10 neurologist that can diagnose him and recommend a course of treatment." Dkts. 24 and 44. The  
11 Report and Recommendation recommends that to the extent Plaintiff seeks injunctive relief from  
12 Defendants DOC Health Services of Stafford Creek Corrections Center, DOC Health Services of  
13 Monroe Corrections Center Special Offender Center, the Medical Care Review Commission,  
14 Light, Casey, Sinclair and Furst, his motion should be denied as moot because all claims against  
15 these Defendants, by this order, should be dismissed. Dkt. 54. Further, the Report and  
16 Recommendation points out that as to Defendants Casey and Light, Plaintiff is no longer housed  
17 in the facility where they work, and so would not be able to afford him the relief he seeks. *Id.*  
18 Plaintiff does not object to these recommendations.

19 In Plaintiff's second motion for injunctive relief, he specifically seeks an order requiring  
20 Defendants Albert and Hammond to ensure he gets proper mental health care. Dkt. 44. The  
21 Report and Recommendation recommends denial of this motion as well. Dkt. 54. While  
22 Plaintiff argues that there are "serious questions going to the merits of his case" against these  
23 Defendants and the balance of hardship tips strongly in his favor, he doesn't actually explain  
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1 what those serious questions are or how the balance of hardship tips strongly in his favor. His  
2 remaining objection, regarding the Report and Recommendation's description of the testing done  
3 on Plaintiff, does not provide a basis to reject the Report and Recommendation.

4 **Conclusion.** The Report and Recommendation (Dkt. 54) should be adopted. This order  
5 does not resolve all issues in the case. The case should be re-referred to U.S. Magistrate Judge  
6 Theresa L. Fricke for proceedings consistent with this order.

7 **ORDER**

8 Accordingly, it is **ORDERED** that:

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- The Court **ADOPTS** the Report and Recommendation (Dkt. 54); and
  - The case **IS RE-REFERRED** to U.S. Magistrate Judge Theresa L. Fricke for  
10 proceedings consistent with this order.
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12 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
13 to any party appearing *pro se* at said party's last known address.

14 Dated this 11<sup>th</sup> day of May, 2018.

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16 ROBERT J. BRYAN  
17 United States District Judge

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